Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1897

G. G. S., INC.,

Petitioner,

vs.

LINOLEX SYSTEMS, INC., and MINNESOTA MINING & MANUFACTURING COMPANY,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

This action arose out of an alleged breach by Linolex Systems, Inc. ("Linolex") of a written agreement between it and G. G. S., Inc. ("GGS"). The written agreement between the parties was attached to GGS's Complaint as Exhibit 1 and has been lodged with this Court.[1] In the District Court, Plaintiff, GGS, moved

1. The first eleven pages of the Agreement plus the cover page and index are the only portions of the Agreement which have been lodged with this Court. The complete Agreement consists of an additional nineteen pages which contain schedules and modifications

(Footnote continued on next page.)

for partial summary judgment, pursuant to Rule 56, Fed. R. Civ. P., on the issue of whether the termination mailed to GGS was timely under the terms of the Agreement between the parties and whether it was entitled to another term of two years. Defendant, Linolex, cross-moved for summary judgment on the basis that proper notice of termination had been given to GGS and that this notice was timely and effective. The District Court granted Linolex's cross-motion for summary judgment and denied GGS's motion for summary judgment. A motion for reconsideration was filed by GGS, and it too was denied. On appeal, the Seventh Circuit affirmed the District Court. GGS's motion for a rehearing before the Seventh Circuit was denied. The pending Petition for a Writ of Certiorari followed.

The Agreement Between GGS and Linolex

On or about January 4, 1973, an Agreement was entered into between GGS and Linolex.[2] This Agreement governed the relationship between the parties as the manufacturer and distributor, respectively, of a word processing machine. On July 10, 1973, the Agreement was modified to name GGS as "Sales Representative" rather than as "Distributor".[3] Paragraph 14 of the Agreement is found in the section concerning "Term of Agreement and Termination" and governs the length of time during which the Agreement was to run. (Agreement at 8). The first term was to run from the date of signing, January 4, 1973, through December 31, 1975. The Agreement further provided that it

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(Footnote continued from preceding page.)
to the Agreement. However, none of the terms in the additional nineteen pages relate to the issues before this Court. Accordingly, for brevity, they were not reproduced.

2. Reference to the Agreement is made by citing the Agreement, a portion of which has been lodged with this Court, and the page of the Agreement on which the paragraph in question is found.

3. This modification of the Agreement is not in issue. It is contained among the pages of the Agreement which were omitted from the materials lodged with the Court.

would be renewed automatically for a two-year period, unless notice was given by either party three months prior to the end of the term of that party's election not to renew the Agreement. The second sub-paragraph of Paragraph 14 then states that it is the company's (Linolex's) intention "that this Agreement shall be terminated only upon DISTRIBUTOR'S failure to meet COMPANY determined standards of performance." (Agreement at 8). The right to change standards of performance was reserved to Linolex, as was the right to determine, in its own discretion, whether the standards had been met by the distributor.

Paragraph 15 governs the termination of the contract for reasons other than expiration of the agreed term. The first sub-paragraph of Paragraph 15 provides for termination for cause, by either party, upon 90 days written notice, as follows:

> This Agreement may be terminated at any time, for cause, by either party giving ninety (90) days written notice to the other. Such notice shall be valid and sufficient if dispatched by certified mail, postage prepaid, to the COMPANY or DISTRIBUTOR at their respective current principal and regular places of business.

(Agreement at 8). The second sub-paragraph of Paragraph 15 provides for cancellation of the Agreement by Linolex should certain events, such as insolvency or bankruptcy, occur. None of these events is relevant to this action. The third sub-paragraph of Paragraph 15 provides, *inter alia,* that:

> COMPANY shall not be liable in any manner whatsoever for termination or cancellation of this Agreement.[4]

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4. The application of this sub-paragraph limiting damages was also raised by Linolex before the District Court. However, the District Court did not rule on the application of this sub-paragraph to the facts of this case because the District Court found Linolex's notice not to renew the Agreement to be effective. Accordingly, this sub-paragraph limiting damages is presented here for information and background purposes only.

The fourth sub-paragraph of Paragraph 15 provides for the disposition of outstanding, but unfilled, orders should termination or cancellation occur.

In addition to the section entitled "TERM OF AGREEMENT AND TERMINATION", the "GENERAL PROVISIONS" section of the Agreement governs the entire agreement between the parties. (Agreement at 9-11). As part of these General Provisions, Paragraph 4 provides that the Agreement shall be governed by and be interpreted in accordance with the laws of Massachusetts. (Agreement at 10). Paragraph 8 of this section is a general paragraph concerning the giving of notice. (Agreement at 11). Finally, Paragraph 10 of the General Provisions section provides that this is an integrated contract and contains the complete agreement of the parties. (Agreement at 11).

The Undisputed Facts Regarding the Expiration of the Agreement

The facts concerning the expiration of the Agreement with GGS as a Sales Representative of the Linolex machine are undisputed. On September 26, 1975, Defendant, Linolex, wrote a letter to GGS notifying it that, pursuant to the terms of the contract, it was not renewing GGS's contract and that the contract would expire on December 31, 1975. This letter was postmarked September 29, 1975 and was sent by certified mail, postage prepaid, to GGS in compliance with the notice provisions of the Agreement. This letter was received by Plaintiff on October 2, 1975. Plaintiff claimed that the termination was not effective because it arrived on October 2, 1975, instead of September 30, 1975 and asked the District Court to rule, through Plaintiff's motion for summary judgment, that the Agreement continued for an additional two-year term. Instead, the District Court granted the Defendant's motion for summary

judgment and ruled that the notice of non-renewal was properly given.[5]

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT, UNDER THE TERMS OF THE WRITTEN AGREEMENT BETWEEN THE PARTIES, TERMINATION UNDER PARAGRAPH 14 DOES NOT REQUIRE A FINDING THAT PLAINTIFF FAILED TO MEET COMPANY DETERMINED STANDARDS OF PERFORMANCE

Plaintiff grounds its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit on the abridgement of its Seventh Amendment right to a jury trial through the Seventh Circuit's allegedly improper application of Rule 56, Fed. R. Civ. P., to the issues before it on Plaintiff's appeal from the District Court's judgment. Plaintiff's constitutional argument, that it was denied the right to a jury trial guaranteed by the Seventh Amendment, has never been raised before and was never argued to or considered by the Seventh Circuit and is a patent attempt to create an issue where there is none.

GGS failed to raise the constitutional question of a denial of its right to jury trial before the District Court or the Court of Appeals, even though GGS petitioned the District Court for reconsideration of its ruling and even though GGS petitioned the Court of Appeals for reconsideration. GGS should be precluded from raising this issue at this point because it failed to do so below. ". . . [A]n issue not presented in the court below cannot be raised for the first time on appeal and form a basis

5. In its Petition for a Writ of Certiorari, GGS does not appear to contest those portions of the rulings of the District Court and the Court of Appeals with respect to the timeliness of the notice.

for reversal." *Country Fairways, Inc.* v. *Mottaz,* 539 F. 2d 637, 642 (7th Cir. 1976) (per curiam); *McElearney* v. *University of Illinois at Chicago Circle Campus,* 612 F. 2d 285, 287-288 (7th Cir. 1979). In the present case, GGS had four opportunities to raise this question. Here, what GGS appears to attack, is the constitutionality of Rule 56, rather than its application to this case.

The simple fact is that Plaintiff moved for summary judgment and lost. Linolex cross-moved for summary judgment on the same facts and won. To interpret the loss of a motion for summary judgment and the granting of a cross-motion for summary judgment as a constitutional deprivation is a paradigmatic attempt to do by the back door what one cannot do by the front door. The real issue before this Court is whether the Court of Appeals decided a question involving Rule 56, Fed. R. Civ. P., in such a way that it departed from the applicable decisions of this Court and calls for an exercise of this Court's power. U. S. Sup. Ct. Rule 19(b), 28 U. S. C. An examination of the Court of Appeals' cogent and reasoned opinion shows that that decision was entirely consistent with the explicit provisions of Rule 56 and with this Court's interpretations of Rule 56.

The Court of Appeals held that the second section of Paragraph 14 of the written agreement between the parties did "not require noncompliance with standards of performance before Linolex could terminate the agreement at the end of the term. . . ." (A. 9). Plaintiff's claim that the Court of Appeals, in so holding, reached outside the explicit terms of the written agreement is incorrect. The Seventh Circuit based its holding solely on the contract and not, as Plaintiff claims, on any facts or circumstances outside the contract.[6] After reach-

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6. Plaintiff's claim that the Court of Appeals weighed facts and circumstances grows from the court's reference to 1 A. Corbin, *Contracts* § 15 (1952) with regard to expressions of intent. (A. 9).

(Footnote continued on next page.)

ing the conclusion that the contract did not require non-compliance with standards of performance, the court set forth three reasons for its holding: 1) the language of the contract; 2) the entire termination provision of the contract; and 3) the unequal obligation between the parties with respect to renewal which would result from enforcing the standards of performance section.

In reviewing the language contained in the second section of Paragraph 14, the court considered both what the section stated and what it did not state. The first sentence of the second section of Paragraph 14 states: "It is the intention of the COMPANY that this agreement shall be terminated only upon DISTRIBUTOR'S failure to meet COMPANY determined standards of performance." The Court of Appeals noted correctly that this paragraph did not use language which would have made it clearly binding and mandatory, such as " 'it is agreed that Linolex will not terminate' " or " 'Linolex shall not terminate.' " (A. 10). Instead, the language of this section can only be regarded as words which do not imply promise.

After analyzing the specific language contained in Paragraph 14, the Court of Appeals went on to analyze the place of Paragraph 14 in the context of the entire contract. This analysis by the Court of Appeals met the requirements of the Agreement (Paragraph 10 of the General Provisions) and Massachusetts law, both of which require that the provisions of

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(Footnote continued from preceding page.)

While it is correct that Corbin, in his discussion, refers to "circumstances" and "surrounding facts", it is also true that the Court of Appeals, in its analysis, reviewed only the written agreement between the parties in reaching its conclusion. Similarly, where the Court of Appeals states in n. 10 (A. 11): "Here, looking at all the circumstances indicates this language is not mandatory.", it was obviously referring to the provisions of the Agreement taken as a whole, since it had just completed that analysis. That analysis did not cite any factual circumstance outside the Agreement itself.

a written contract be interpreted as a whole. *Restatement of Contracts* § 235 (1932); *Crimmins & Peirce Co.* v. *Kidder Peabody Acceptance Corp.*, 282 Mass. 367, 185 N. E. 383, 387 (1933). The Court of Appeals correctly interpreted Paragraphs 14 and 15 together as part of a single contract, these being the sections of the contract which provide for the cessation of a business relationship, either by the expiration of a period of time or for cause. The first sentence of Paragraph 14 provides for the expiration of the contract at the end of a term. That expiration is conditional on nothing other than the passage of time and the giving of notice. The second sub-paragraph of Paragraph 14 leads logically into Paragraph 15 and sets up a condition precedent to the termination, for cause only, for which the first sub-paragraph of Paragraph 15 provides. Mid-term termination by the distributor can only be for cause, which includes the distributor's failure to meet standards of performance. As the Court of Appeals properly noted, GGS's proposed interpretation of Paragraph 14 would either make Paragraphs 14 and 15 redundant or make "it more difficult to terminate a contract at the end of its term than in the middle of the term of the contract." (A. 10). Where a written instrument can be given a simple and logical interpretation, as was given to it by both the District and Appellate Courts, Plaintiff's proposed convolution must be rejected.

The Court of Appeals, as its third basis for finding the standards of performance language nonmandatory, examined the bargain struck by the parties in the written agreement. The court noted that the interpretation proposed by Linolex allowed the parties to remain in equal positions with regard to termination. GGS's proposed interpretation, however, would allow GGS to decide not to renew the contract at the end of a term, without another word said, but would require Linolex to show that GGS had not met standards of performance prior to allowing the contract to expire at the end of a stated term. Not only is such an interpretation illogical, but it would also leave the parties on

an unequal footing which was not envisioned by the several termination provisions of the contract. As the Court of Appeals indicated, such a lack of mutuality would have to have been stated more explicitly if it were to be enforced by the court. (A. 10).

The Agreement between the parties which is the subject of this action is unambiguous on its face, as was determined by the District Court. (A. 16).[7] Where a contract is unambiguous on its face, the construction and application of the contract is solely a matter of law and therefore the proper subject for summary judgment. *Fitzsimmons* v. *Best,* 528 F. 2d 692, 694 (7th Cir. 1976). Similarly, under Massachusetts law, the construction of an unambiguous written contract is a pure question of law for the court to decide. *Daley* v. *J. F. White Contracting Co.,* 347 Mass. 285, 197 N. E. 2d 699, 702 (1964); *St. Germain & Son, Inc.* v. *Taunton Redevelopment Authority,* 4 Mass. App. Ct. 46, 340 N. E. 2d 916, 920 (1976); *Fried* v. *Fried,* 77 Mass. App. Ct. Adv. Sh. 1134, 368 N. E. 2d 1222, 1225 (1977). If the disputed contract provisions themselves disclose what the parties intended, the need for inquiry into extrinsic sources of information is obviated and summary judgment is appropriate. *Fay, Spofford & Thorndike, Inc.* v. *Massachusetts Port Authority,* 79 Mass. App. Ct. Adv. Sh. 605, 387 N. E. 2d 206, 210 (1979).

It is clear from the District Court's opinion that the court found the Agreement unambiguous. Without looking beyond the four corners of the contract, the court noted:

> There is no patent ambiguity in the provisions which govern termination, and the parties do not submit any evidence of latent ambiguities or other facts which would require evidence over and above what is in the record now.

(A. 16). Later, the court observed that the Plaintiff's proposed construction of Paragraph 14, when read in light of Paragraph

7. Presumably, if GGS had thought an ambiguity existed in the Agreement, it would not have moved for partial summary judgment.

15, "would be not rational." (A. 17-18). Once it was determined that the contract was reasonably susceptible of only one interpretation, the court did precisely what Massachusetts law directs: it construed the contract solely as a matter of law.

On appeal, the Seventh Circuit reviewed the District Court's determination that the contract was unambiguous. Rather than determine "the meaning of the ambiguous clause by its own fact finding process", Petition at 12, as the Plaintiff asserts, the Court of Appeals found exclusively from the face of the Agreement that the disputed clauses were, in fact, unambiguous. Three elements figured in the court's decision, none of which required it to engage in fact finding. First, the court looked to the plain meaning of the language used by the parties. Second, it construed Paragraph 14 in light of Paragraph 15. Third, it read the words of the contract in such a way that mutuality of obligation was achieved. (A. 9-11). After agreeing with the District Court that the contract was unambiguous, and thus to be construed as a matter of law, the court properly applied Massachusetts law in affirming summary judgment.

The Court of Appeals followed the same basic procedure adopted by the Massachusetts Appeals Court in *Fay, Spofford & Thorndike, Inc.* v. *Massachusetts Port Authority*, 79 Mass. App. Ct. Adv. Sh. 605, 387 N. E. 2d 206, 210 (1979). There, too, the court was asked to review a summary judgment regarding the meaning of a termination clause. Without going beyond the four corners of the agreement, the court not only construed language in the contract, but went so far as to furnish a missing term. If summary judgment was appropriate in *Fay*, it is surely appropriate here where the role of the reviewing court was more restricted.

The Petition for a Writ of Certiorari reveals that the Plaintiff does not comprehend the role of a reviewing court in summary judgment poceedings. The thrust of the Petition is aimed at the Seventh Circuit's purportedly improper interpretation of

what the parties intended the disputed clauses to mean. As shown above, however, a court may interpret contract terms to determine that the agreement is unambiguous as a matter of law. If Plaintiff's argument were accepted, "summary judgment could never be granted in contract actions because arguably some term in every contract is subject to interpretation." *Universal Fiberglass Corp.* v. *United States,* 400 F. 2d 926, 929 (8th Cir. 1968). Only if the court decides the terms are ambiguous is a trial on the facts required.

Plaintiff's Petition for a Writ of Certiorari presents no question sufficient to invoke this Court's jurisdiction. Plaintiff's claim of constitutional deprivation was never raised below and can not be regarded as meritorious at this stage. Plaintiff has failed to demonstrate that the Seventh Circuit considered a single fact or circumstance outside the four corners of the GGS-Linolex Agreement or that either the District Court or the Court of Appeals found an ambiguity in the contract which would warrant inquiry beyond the contract. Plaintiff mistakenly suggests that a court should look beyond the contract to the intentions of the parties. This suggestion overlooks the fact that inquiry beyond the contract should only be made if the contract itself, taken as a whole, is ambiguous. To date, no court has found the Agreement between the parties to be ambiguous. The Court of Appeals properly affirmed the District Court's application of Rule 56.

Wherefore, Linolex prays that this Honorable Court deny Plaintiff's Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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